

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition for Declaratory Ruling: Lawfulness)
of Incumbent Local Exchange Carrier)
Wireless Termination Tariffs)

CC Docket No. 01-92

Petition of US LEC Corp. for Declaratory)
Ruling Regarding LEC Access Charges for)
CMRS Traffic)

COMMENTS OF THE
ALLIANCE OF INCUMBENT RURAL INDEPENDENT TELEPHONE COMPANIES

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SUMMARY

The Alliance of Incumbent Rural Independent Telephone Companies (the “Alliance” or “Rural Companies”) respectfully requests that the Commission expediently deny the “T-Mobile Petition” (hereafter referred to as the “CMRS Petition”), and grant the “US LEC Petition” referenced in the Commission’s *Public Notice*, DA 02-2346, released September 30, 2002.

The CMRS Petition and US LEC Petition reflect an untenable situation that has been imposed on rural LECs as a result of a pattern of conduct and practice in which certain CMRS carriers, LEC tandem providers, and interexchange carriers arrange among themselves to send traffic to rural LECs for termination, but each denies any responsibility to compensate the rural LEC. The result of these practices is a substantial financial detriment to the rural LECs and a free ride for the CMRS carriers and the carrier that provides them with indirect interconnection to the rural LEC. The Commission cannot, consistent with the Act, allow to continue, much less sanction by declaratory ruling, a “status quo” that perpetuates this inequity.

The uncertainty alleged by the CMRS Petitioners as justification for a declaratory ruling does not exist, and they have not shown how the filing of state tariffs denies any of their rights to negotiate interconnection arrangements. The CMRS Petitioners go to great lengths to attempt to tie their petition to established Commission precedent, but the cited precedents from the 1980s antedate the substantive changes in the law. The Act now includes a statutorily mandated framework for the provision of an interconnection request, the negotiation of the request and subsequent arbitration of the request when necessary.

Where rural LECs have filed tariffs applicable to indirect interconnection, these tariffs reflect the establishment of general terms and conditions in the absence of an interconnection request. The filing of general terms and conditions, including these tariffs, is consistent with the

Telecommunications Act of 1996. **As** established by Section 252(f) of the Act, the filing of general terms and conditions is permissible and does not impede the right of any carrier to negotiate terms and conditions pursuant to Section 251.

The Alliance respectfully submits that the Commission should not condone the actions of any carrier that seeks to avoid its responsibility for payment of interconnection and access services. The Alliance further submits that the Commission should investigate the conduct and practices of carriers that have engaged in bilateral agreements to achieve indirect interconnection to rural LEC networks and deny responsibility for payment for the interconnection services they receive from the rural LECs. Finally, the Alliance urges the Commission to deny the CMRS Petition and to grant the US LEC Petition on an expeditious basis.

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COMMENTS OF THE
ALLIANCE OF INCUMBENT RURAL INDEPENDENT TELEPHONE COMPANIES

The Alliance of Incumbent Rural Independent Telephone Companies (the “Alliance” or “Rural Companies”) respectfully submits these Comments in response to the Commission’s *Public Notice*, DA 02-2346, released September 30, 2002.¹ By the *Public Notice*, the Commission has asked for comments on two petitions requesting rulings regarding the intercarrier compensation regime applicable to certain traffic that is originated on the network of a CMRS provider and indirectly interconnected to the networks of local exchange carriers (“LECs”).

¹ The Alliance, an *ad hoc* coalition of several hundred rural companies and state groups of companies, has previously participated in this docket and other proceedings. The Alliance has previously addressed many related issues in prior reply comments in this docket. See Reply Comments of the Alliance of Incumbent Rural Independent Telephone Companies and the Independent Alliance, filed November 5, 2001, in this docket (“Rural Companies Reply Comments”) at pp. 5-11. The Alliance also filed comments in this docket regarding a Petition filed by Sprint Corporation related to its interconnection with BellSouth and the potential ramifications for third party rural LECs. The Alliance comments highlighted concerns with “indirect” interconnection arrangements established by CMRS licensees and RBOCs that are inequitable to, and burdensome for, rural LECs. See Comments of the Alliance of Incumbent Rural Independent Telephone Companies and the Independent Alliance, filed in this docket on August 8, 2002.

The first petition was filed by a group of wireless carriers (“CMRS Petitioners”) ² and asks the Commission to declare unlawful any LEC tariff that establishes terms and conditions applicable to the termination of traffic originated on a CMRS network and interconnected indirectly to the LEC network through an established physical interconnection with a third party that transports the subject traffic. As discussed below, the CMRS Petition does not address an existing controversy or uncertainty that warrants the declaratory relief requested. Accordingly, the CMRS Petition should be rejected in its entirety.³

The second petition, filed by US LEC Corp.,⁴ asks the Commission to reaffirm that “LECs are entitled to recover access charges from IXC (interexchange carriers) for the provision of access service on interexchange calls originating from, or terminating on, the networks of CMRS providers.” Unlike the CMRS Petition, the US LEC Petition addresses an actual controversy that has resulted from unnecessary confusion. CMRS providers may and do elect to use the services of an IXC to transport calls to LEC end offices. End user LEC customers may and do elect to utilize the IXC of their choice to provide service on interexchange calls that may terminate to a

² Petition for Declaratory Ruling, filed on September 6, 2002, by T-Mobile USA, Inc.; Western Wireless Corporation, Nextel Communications and Nextel Partners in the docket captioned above (“CMRS Petition”).

³The Alliance respectfully notes that the CMRS Petition does, however, bring to the Commission’s attention a pattern of conduct enacted by both certain CMRS providers and large LEC tandem providers that has resulted in needless confusion and the failure to provide compensation to rural LECs for the utilization of their network services. In many instances, the CMRS provider and the large LEC involved in this conduct are affiliated carriers. The Alliance will briefly address the associated general facts related to this issue in Sections I and II, *infra*. The Alliance respectfully requests and anticipates that the Commission will initiate an investigation into this pattern of conduct in order to address and remedy this matter.

⁴ Petition for Declaratory Ruling of US LEC Corp., filed September 18, 2002 in the Docket Captioned above (“US LEC Petition”). Although the US LEC Petition is dated September 18, 2002, the Commission stamped the petition as having been received on September 26, 2002.

CMRS customer. In either instance, the IXC utilizes the access service of the LEC (either to terminate or originate the call), and in either instance the LEC is entitled to access charges from the IXC. Under all applicable law and regulation, the nature of the interexchange service provided by the IXC is not altered simply because a CMRS user was on either the originating or terminating point of the interexchange communication. It is disingenuous for any IXC to feign confusion regarding the law and the Commission's rules in an attempt to avoid its access payment obligations. Accordingly, the US LEC Petition should be granted.

I. Introduction: The Offices of the Commission should not be Utilized to Perpetuate a Practice Whereby Carriers Attempt to Obtain "Free" Interconnection to Rural Networks.

Together, the CMRS Petition and US LEC Petition reflect an untenable situation that has been imposed on rural LECs as a result of a pattern of conduct and practice in which certain CMRS carriers, LEC tandem providers, and interexchange carriers' have engaged.⁵ As indicated by the CMRS Petition, many CMRS providers have determined that it is in their interests to interconnect with the networks of rural LECs indirectly by utilizing the network of another carrier with an established physical connection to the rural LEC. The rural LECs recognize that a CMRS provider, or any other carrier, most clearly has the right to connect indirectly in this

⁵ The term "interexchange carrier or IXC" includes the large Bell Operating Carriers ("BOCs"), each of which provides intraLATA interexchange services. In many instances, CMRS providers choose to connect traffic "indirectly" to the networks of rural LECs by utilizing the networks of IXCs or the tandem and transport facilities of another LEC.

⁶ While the Alliance does not allege in these comments that this pattern of conduct and practice is either the product of a conspiracy or an attempt by any party to defraud, the Alliance does, however, set forth these general facts which should be further investigated by the Commission: CMRS providers and third party carriers have entered into arrangements whereby the CMRS provider achieves interconnection to rural LEC networks and neither the CMRS provider nor the third party carrier take responsibility for compensation to the rural LEC for the use of its network.

manner. The Alliance maintains, however, that this arrangement, established bilaterally between the CMRS provider and an IXC or tandem provider, does not result in “free” interconnection to the rural LEC network.

In practice, however, where this arrangement exists, the rural LEC has generally been denied compensation for the service it provides in terminating the call. When the rural LEC demands compensation from the third party (most often the BOC tandem provider) carrier that transits the CMRS traffic to and from the LEC network, the third party denies responsibility to the rural LEC on the basis that the traffic is “CMRS.” (This is the situation described in the US LEC Petition.) Where the rural LEC looks to the CMRS provider to compensate it for the interconnection achieved through the third party carrier, the CMRS carrier denies responsibility. (This is the set of circumstances and result - i.e., free interconnection - described in the CMRS Petition for which the CMRS petitioners seek, *indirectly*, to obtain the Commission’s sanction.)

As noted by the CMRS Petitioners, rural LECs in several states have filed tariffs to establish general terms and conditions applicable to their provision of terminating services under these circumstances.⁷ The CMRS Petitioners fail to note, however, the circumstances that resulted in the filing of the tariffs. And the CMRS Petition misleads the Commission by its suggestion that any rural LEC has filed a tariff “to bypass the bilateral negotiations process mandated by the Communications Act and the Commission’s LEC-CMRS interconnection policies.”⁸

⁷ CMRS Petition, pp. 4-5.

⁸ *Id.* at p. 4.

It is the CMRS Petitioners and other CMRS providers' that have elected to interconnect to rural LEC networks through third party carriers and consequently "to bypass the bilateral negotiations process." By establishing indirect interconnection in this manner, and as described by the CMRS Petitioners throughout their Petition, the CMRS Petitioners hope and expect to avoid any responsibility for payment of charges for interconnection to the rural LEC networks.'"
As described above, when the rural LEC seeks compensation for its services under this indirect interconnection arrangement, both the CMRS provider and the third party carrier have denied responsibility. In response to this set of indefensible circumstances and conditions, rural LECs have filed state tariffs in order to set forth a statement of the terms and conditions pursuant to which the rural LEC offers the interconnection service that the CMRS provider and the third party carrier (through which the CMRS provider connects indirectly to the rural LEC) have bilaterally elected to take from the rural LEC.

As discussed in Section II, *infra*, the establishment of the tariff to address these circumstances in no way precludes any CMRS provider from pursuing its right to negotiate interconnection with any rural LEC. The tariffs that are generally the subject of the CMRS petition reflect a response by rural LECs to a set of circumstances that cannot stand. When a

⁹ The Alliance recognizes that the concerns it raises in response to the CMRS Petitioners may not be applicable to all CMRS providers. In fact, many of the smaller rural CMRS providers are affiliated with members of the Alliance, and these rural telecommunications providers seek a sound and stable interconnection policy that mutually addresses the interconnection concerns of all rural carriers irrespective of the technologies they employ. The indirect interconnection arrangements negotiated by certain CMRS carriers and certain LECs without regard for the rural LECs establishes that this matter is not a "Wireless Industry vs. LEC Industry" issue.

¹⁰ The CMRS Petitioners, in fact, brazenly refer to this result as the "*status quo*," as if their establishment and imposition of interconnection to the rural LEC with self-proclaimed impunity renders their policy the law of the land.

CMRS carrier elects to enter into a bilateral agreement with another carrier in order to achieve *indirect interconnection* to the rural LEC, there is no spontaneously generated right to deprive rural LECs of compensation for the utilization of their network. The Alliance respectfully asks that the Commission expeditiously and clearly demonstrate that it has not and will not condone this result and that it, accordingly, deny the CMRS Petition and grant the US LEC petition."

II. The CMRS Petition Does Not Address Either an Existing Controversy or Uncertainty that Should be Terminated by Grant of the Request; the Petition should be Denied.

Under the guise of their declaratory ruling request, the CMRS Petitioners seek to avoid responsibility for payment of interconnection to rural LEC networks. The CMRS Petition is premised on incorrect factual assertions, omitted facts, inaccurate portrayal of law and regulation, and omission of pertinent law and regulations. Rural LECs have long held a growing concern that an institutional prejudice exists against their concerns with respect to any issue related to CMRS interconnection.¹² Within the context of this proceeding, the Alliance trusts that the

¹¹ While the remainder of the Alliance Comments will focus on the deficiencies of the CMRS Petition, the Alliance respectfully notes that its discussion of facts, law and regulation in the context of the appropriate denial of the CMRS Petition is generally applicable to the basis for grant of the US LEC petition. When customers or CMRS providers elect to send calls to or from a CMRS customer over the facilities of an IXC, the IXC is responsible for paying the applicable access charges associated with its service. The fact that the IXC is carrying a call to or from a CMRS customer does not relieve the IXC of its responsibilities. The Alliance is aware of at least one recent situation where an IXC initially attempted to assert a denial of this responsibility. Subsequently, the IXC acknowledged its incorrect analysis and withdrew its assertion.

"At minimum, this concern is given credence by an appearance of disregard with respect to issues addressed by rural LECs, but not acted upon by the Commission. *See, e.g.,* Petition for Reconsideration filed on June 14, 2001, of the *Order on Remand and Report and Order*, released April 27, 2001, in CC Docket Nos. 96-98 and 99-68, regarding the compensation for ISP-bound traffic (the "Independent Alliance). The significance of the issue before the Commission in this proceeding, and the ultimate objective of the CMRS Petitioners - free interconnection to rural LECs, and the resulting impact on universal service cost recovery - cannot be disregarded.

Commission will demonstrate that it does not uncritically accept a request for relief based on inaccurate factual assertions, omitted facts and errant analysis simply because it is delivered under the imprimatur of a CMRS provider.

A. The request by the CMRS Petitioners that the Commission nullify rural LEC state tariffs is factually flawed. The filing of state tariffs has not resulted in the denial of any right of any petitioner.

A declaratory ruling is undeniably appropriate to terminate a controversy or to remove uncertainty under section 5(d) of the Administrative Procedure Act and the Commission's Rules." The CMRS Petitioners, however, have presented in their declaratory ruling request an ersatz controversy within the context of self-manufactured uncertainty. The CMRS Petition is crafted in a manner that suggests a controversy that simply does not exist. Specifically, the CMRS Petitioners paint a false illusion. They wrongfully suggest that rural LECs have tiled tariffs "unilaterally" to govern their interconnection relationship with CMRS providers. They inaccurately state that rural LECs utilize the establishment of tariffs as a mechanism to avoid negotiation with CMRS providers. And, they imply the existence of a *status quo* to which rural LECs have acquiesced whereby the rural LECs would be deprived of compensation for utilization of their network.¹⁴

¹³ 47 CFR § 1.2.

¹⁴ CMRS Petition at pp. 4-5, 7 and 10.

1. Rural LECs do not utilize tariffs to impose unilateral interconnection terms on CMRS providers and to “bypass” good faith negotiations; if this circumstance existed, appropriate remedies are available to CMRS providers.

The essence of the CMRS Petition argument is that the LEC tariffs that address CMRS indirect interconnection should be declared unlawful because the existence of the tariff somehow, in some non-specified manner, interferes with the right of a CMRS provider to negotiate interconnection.¹⁵ In making this request, the CMRS Petitioners ignore the reality that it is the CMRS Petitioners that have chosen not to negotiate interconnection and instead to establish indirect connectivity to the rural LECs. As discussed in Section I, *supra*, the tariffs that are the subject of the CMRS Petition exist as a response of rural LECs to the bilateral establishment of indirect interconnection to the rural LEC network by a CMRS provider and another carrier, neither of which will accept responsibility for the utilization of the rural LEC network.

Contrary to the misleading assertions by the CMRS Petitioners, there are no facts that support a claim that any rural LEC has filed a tariff in order to govern interconnection terms and conditions with CMRS providers on a unilateral basis. The existence of the tariffs reflects the establishment of general terms and conditions applicable to *indirect interconnection* established in the absence of an interconnection request.

Contrary to the misdirecting suggestions of the CMRS Petitioners, there are no facts presented to support a claim that any LEC has attempted to utilize a filed tariff as a shield to avoid good faith negotiation of interconnection with any CMRS provider. If such a circumstance existed, an appropriate remedy - and not the declaratory ruling request - exists for the CMRS

¹⁵ See, e.g., CMRS Petition at pp.4, 7, 8, 10, and 12-13. The fact that the subject LEC tariffs are not only appropriate, but also specifically anticipated by the 1996 Telecommunications Act will be addressed in Section II B.

provider pursuant to both the Commission's rules and § 252 of the Telecommunications Act of 1996 (the "Act"). In the event that the CMRS provider and the LEC do not reach mutual agreement regarding interconnection terms and conditions, the CMRS provider may **seek** State Commission arbitration of its interconnection. In the event that the State Commission does not act, § 252 of the Act provides the process whereby this Commission may assume the responsibilities of the State Commission.

2. The Rural LECs have not attempted to change unilaterally a *status quo* that they previously accepted; the Rural LECs have filed tariffs to address the circumstances under which a CMRS provide and another carrier jointly send traffic to a rural LEC network and each denies responsibility.

It is particularly ironic to note within the context of the CMKS Petition that the rural LECs are not afforded the same equal protection under the Act that is afforded to the CMRS providers. Under identical circumstances, the Act does not provider the incumbent LEC with the affirmative right to request that a CMRS carrier provide direct interconnection and good faith negotiations of terms and conditions subject to an arbitration process.¹⁶ Moreover, this ironic absence of equal protection demonstrates the disingenuous nature of the gratuitous suggestion by the CMRS Petitioners that the rural LECs should simply enter into interconnection negotiations if they want "to change the *status quo*."¹⁷

The would-be "*stutus quo*" to which the CMRS Petitioners refer is their unsubstantiated claim that "*de minimus* amounts of intra-MTA traffic with CMRS providers are exchanged

¹⁶ The Act specifically establishes the arbitration process in the context of circumstances whereby the "incumbent local exchange carrier receives a request for negotiation under this section. . . ." § 252(b)(1) of the Act, emphasis added.

¹⁷ See, e.g., CMRS Petition at p. 10.

without a formal interconnection agreement and typically on a bill-and-keep basis.”¹⁸ Rural LECs, however, have not purposefully entered into this “*status quo*” or knowingly accepted it. The Petitioners’ “*status quo*” is a product of bilateral agreements with other carriers that did not include the rural LECs.

Rural LECs have long been aware of CMRS indirect interconnection through an IXC, and recognized and fulfilled their obligations to provide this indirect interconnection. Under these circumstances, the IXC may contract with the CMRS provider to transport and terminate the CMRS carrier traffic to LEC end offices. When this occurs, the IXC requests terminating access service from the LEC and pays the LEC for its service according to the applicable access charges.” This indirect interconnection arrangement of a CMRS provider with an IXC may include interconnection through a BOC. As noted by the CMRS Petitioners, the BOCs have generally served as the dominant provider of intraLATA IXC service and provide indirect interconnection between CMRS carriers and rural LECs.²⁰

If the BOC provided indirect interconnecting service to provide indirect interconnection for the CMRS provider to the rural LEC as an IXC and compensated the rural LEC for the utilization of its access services, no need for a rural LEC tariff to define the terms and conditions of indirect interconnection would exist. Unfortunately, this is not the case.

As indicated by the CMRS Petitioners, the BOCs have apparently held out to the CMRS carriers that they can obtain indirect interconnection to rural LEC end offices by executing an

¹⁸ CMRS Petition, p. 7.

¹⁹ Until recently, the rural LECs had not experienced attempts by IXCs other than the BOCs to avoid access payments. The US LEC petition is an example of such an attempt that should not be countenanced.

²⁰ CMRS Petition, footnote 8.

interconnection agreement with the BOC.²¹ Accordingly, the BOC executes an interconnection agreement with the CMRS provider which, in turn, expects the BOC to transit traffic between the rural LEC and the CMRS point of interconnection with the BOC network.²² As evidenced by the CMRS Petition, the CMRS carriers further expect that this arrangement obviates any requirement for them to compensate the rural LEC for interconnection.²³

The resulting “*status quo*” is that CMRS providers obtain “free” interconnection to rural LEC networks. The simplistic suggestion that the rural LEC should “attempt to negotiate an interconnection agreement.” if it desires to change the “*status quo*” is an empty gesture. The “*status quo*” was imposed on the rural LEC as a result of the bilateral “transit” agreement

²¹ CMRS Petition, pp. 2-3.

²² The Commission should note that the CMRS Petitioners provide an inaccurate and inapplicable definition of the “transit carrier” arrangement at footnote 6 of the CMRS Petition. The description provided by the Petitioners may be applicable to a situation where a carrier voluntarily requests a transit carrier to transport traffic to another carrier. In the circumstances set forth in the CMRS Petition, the rural LECs have not requested any carrier to carry traffic on their behalf beyond their own network. Nor have the rural LECs had the opportunity to bargain or negotiate the terms and conditions upon which they would receive the transited traffic. The CMRS carrier and the BOCs have entered into bilateral arrangements, sent the traffic through an established physical connection, and both deny responsibility for paying the LEC for termination. In response, rural LECs have filed tariffs to establish general terms and conditions to govern such circumstances where they have been given no opportunity to negotiate mutually agreeable interconnection terms and conditions provided by the Petitioners

²³ The Alliance suggests that the expectation of “free” interconnection demonstrates a lack of candor on the part of at least some CMRS providers. Alliance members have reviewed interconnection agreements between a BOC and a CMRS carrier that provide that when the BOC transits the CMRS traffic to the rural LEC network, the BOC anticipates that the terminating carrier will assess a charge and that the BOC will pass the charge on to the CMRS carrier. The tariffs filed by the rural LECs set forth such charges: clearly, the CMRS Petitioners could avoid the charge they have contracted to accept if the Commission were wrongly persuaded to accept their request. **While** the Alliance will, of course, respond to a Commission or Staff request to provide a copy of the documentation that sets forth the term and condition described above, similar documentation should be readily available in the publicly filed interconnection agreements between certain CMRS providers and certain BOCs.

between the CMRS carrier and the BOC. The rural LEC was afforded no opportunity to bargain for the terms and conditions of their provision of the terminating service on this indirect interconnection; the rural LEC had no technical ability to stop the flow of the subject traffic through the indirect interconnection arrangement to its network.

The filed tariffs reflect an attempt by the rural LECs to ensure that an interconnecting carrier takes responsibility for payment of the services it receives when an indirect interconnection is imposed on the rural LEC and both the originating carrier and the transit carrier deny responsibility. The filed tariff does not impede the right of the CMRS provider to request interconnection and to negotiate terms and conditions of an interconnection agreement in good faith.²⁴ The CMRS Petitioners have not provided any facts that demonstrate that any rural LEC is utilizing a tiled tariff as a basis to avoid good faith interconnection negotiations.

The filed tariffs represent the establishment of general terms and conditions applicable to those situations and circumstances where connecting carriers elect to utilize indirect interconnection to a rural LEC and choose not to negotiate individual terms and conditions. The CMRS Petitioners would like the Commission to grant their request in order to afford them the opportunity to lawfully continue to utilize the rural LEC terminating services for free. The Alliance respectfully urges the Commission to expeditiously deny the request in order to terminate the controversy and uncertainty the CMRS Petitioners have manufactured.

²⁴ The Alliance is compelled to underscore the hypocrisy inherent in the invective claim that a rural LEC “with a lucrative wireless termination tariff in effect that contains one-sided prices, terms and conditions, has no incentive to negotiate a reasonable interconnection agreement with a CMRS provider.” (CMRS Petition, p. 7.) It is the CMRS provider that obtains free interconnection to the rural LEC through indirect interconnection that “has no incentive to negotiate a reasonable interconnection agreement!” The CMRS Providers seek to cement their lucrative position by extracting the Commission’s endorsement of their request.

B. The Request by the CMRS Petitioners that the Commission nullify Rural LEC State tariffs is based on analysis that is legally flawed; the filing of the subject state tariffs is consistent with the Act.

As described in Section II A, above, the CMRS Petitioners frame their request within a context of inaccurate factual assertions and factual omissions. The Petitioners attempt to support their inaccurate factual portrayal with inaccurate and incomplete legal analysis

Most significantly, the Petitioners inaccurately assert that the grant of their declaratory ruling request “would be reaffirming prior decisions declaring that an incumbent local exchange carrier (“ILEC”) engages in an unlawful practice when it unilaterally files wireless termination tariffs.”²⁵ This analysis, as discussed below, wholly ignores the negotiation and arbitration framework established by the Act subsequent to the decisions to which the Petitioners refer.

The CMRS Petition is replete with casual legal references, analysis, and implications that are inaccurate or incomplete. While the request of the CMRS Petitioners cannot stand irrespective of these matters, the Alliance will not overlook these issues and thereby permit silence to suggest acceptance. Nor should the Commission condone the incorrect legal conclusions and suggestions presented by the CMRS Petitioners.

The implications of the suggestion by the CMRS Petitioners that the rural LEC tariffs about which they complain were established on a “unilateral” basis²⁶ belies the more complete understanding of the tariff process that the CMRS Petitioners undoubtedly possess. Similar concerns arise with respect to the effort by the CMRS petitioners to suggest that the pricing standards set forth in § 252 (d)(2) of the Act are applicable to § 251(a)(1) indirect

²⁵ CMRS Petition, p. 2.

²⁶ *See, e.g.*, CMRS Petition at pp..5, 7 and 10.

interconnection.” Finally, and irrespective of the fact that the Alliance does not question the Commission’s jurisdiction over CMRS interconnection, even the discussion by the CMRS Petitioners of the basis of the Commission’s jurisdiction over the subject matter of their request misses the mark and further demonstrates the confusion the CMRS Petitioners have created with respect to their rights and obligations regarding a request for interconnection in contrast to the utilization of indirect interconnection in the absence of a request. The Alliance will address each of these matters briefly below.

1. Grant of the CMRS Petition would not constitute reaffirmation of prior Commission decisions; it would constitute disregard of subsequently adopted statutory provisions.

The CMRS Petitioners go to great length in an unsuccessful attempt to demonstrate that their requested relief is consistent with prior Commission decisions. Specifically, the CMRS Petitioners inaccurately suggest the application of 1987 and 1989 decisions to the existing facts and circumstances.²⁸ The petitioners cite these cases to support their wrongful accusation that the rural LECs have acted in “bad faith” by filing the tariffs that are the subject of their request. **As** discussed in Section II **A**, the Petitioners inaccurately portray the facts to suggest that the rural LEC tariffs preempt good faith negotiation. The Petitioners are not only wrong with respect to their discussion of the facts, but they are also wrong on the application of the law.

There is no question that under entirely different circumstances the Commission did decide in 1987 and reaffirm in 1989 that “tariffs should not be filed before co-carriers have conducted good faith negotiations on an interconnection agreement.” The difference in

²⁷ CMRS Petition, p. 5 and 6.

²⁸ CMRS Petition, p. 8-9, citing *Second Radio Common Carrier Order*, 2 FCC Rcd 2910 (1987) and *Third Radio Common Carrier Order*, 4 FCC Rcd 2369 (1989).

circumstances is the passage of the Act. In 1989, there were no §§ 251, 252 or 332(c)(1)(B) in the Communications Act. The Commission's 1987 and 1989 decisions obviously addressed interconnection negotiation requirements in an environment that did not include a statutorily mandated framework for the provisions of an interconnection request, the negotiation of the request, and subsequent arbitration of the request when necessary.

Perhaps most significant and determinative of the issues raised by the CMRS Petitioners is the relevance of §252(f)(1) which permits the incumbent LEC "to prepare and file with a State Commission a statement of the terms and conditions that such company generally offers within the State to comply with the requirements of Section 251 and the regulations thereunder and the standards applicable under this section."²⁹ This section of the Act clearly anticipates the filing of the very type of tariff that the CMRS Petitioners would ask the Commission to nullify.

In response to a very specific set of circumstances and needs (i.e., CMRS providers and BOCs entered into agreements to interconnect traffic to rural LEC networks and both deny financial responsibility to the rural LEC), rural LECs have established tariffs that set forth the terms and conditions pursuant to which they offer certain interconnection services. The concern professed by the CMRS Petitioners that the filed tariff precludes their right to negotiation is a red herring that ignores the facts and the law. As noted herein, the filing of a tariff by rural LECs does not preclude the negotiation rights of any CMRS carrier that determines that it would prefer to request interconnection from the rural LEC and negotiate terms and conditions of an agreement. This is not a gratuitous offering by rural LECs; it is recognition of a statutory

²⁹ Although the cited statutory provision refers to "a Bell Operating company," the Alliance assumes that the Commission would afford rural LECs the same right.

requirement that, together with §252(f)(1), the CMRS Petitioners have apparently ignored.”

The claim by the CMRS Petitioners that the Commission should grant their request and nullify the rural LEC tariffs in order to comply with “the letter and the spirit of Sections 251 and 252 and the Commission’s LEC-CMRS interconnection rules and policies” is incorrect and based on an incomplete analysis of FCC decisions that disregards specific applicable provisions of the Act. The CMRS Petition should be rejected.

2. Neither a CMRS provider nor any other affected party is precluded from participation in the establishment of a tariff or from subsequently questioning the lawfulness of any term or condition. The Act contemplates the establishment of tariffs and, once established, a party’s right to individual negotiation of interconnection is not precluded.

The CMRS Petition paints a portrayal of the circumstances that have led rural LECs to file tariffs that not only omits the facts, as discussed in Section II A, but also improperly implies that the Petitioners have been denied procedural rights. The Petitioners repeatedly refer to the subject tariffs as “unilateral,” and imply that the process whereby the tariff was filed was wrongful.³¹

While the process of filing a tariff may be “unilateral,” the process is neither wrongful nor does it result in the deprivation of any right. In general, the tariff filing process in any state is similar to that which is utilized by the Commission. The filing party sets forth terms and conditions in accordance with the applicable law and regulations. Subsequent to the filing, an administrative process exists whereby any affected party may intervene and object to the filing.

³⁰ §252(f)(5) addresses the obligation to negotiate terms and conditions of an interconnection agreement under § 251 irrespective of whether a tariff is filed if a carrier requests individual negotiation.

³¹ See, e.g., CMRS Petition at pp. 5, 7 and 10.

In addition, the regulatory body before which the tariff is filed may, on its own, suspend and investigate the tariff prior to its terms and conditions becoming effective. Moreover, general administrative procedures permit an affected party to challenge the lawfulness of a tariff term or condition that is in effect

The CMRS Petitioners attempt to portray the terms and conditions of any rural LEC tariff as harmful to the extent that it should be nullified is entirely misplaced.³² Under ordinary circumstances, administrative process before the appropriate regulatory body is available to address any concern with a filed tariff. More pertinent perhaps, and entirely overlooked by the Petitioners, is that under circumstances relating to § 251 interconnection, the filed tariff does not preclude any Petitioner or any other CMRS provider from requesting interconnection and negotiation with a LEC irrespective of the filed tariff (as discussed in Section II B 1, above). The innuendo suggested by the CMRS Petitioners with respect to the rural LEC tariffs is inaccurate, ignores both applicable statutory provisions and administrative procedure, and provides no basis for the general nullification of rural LEC tariffs.

3. The Act does not apply “TELRIC” pricing to indirect interconnection.

Among the general concerns that the CMRS Petitioners raise with respect to the rural LEC tariffs is “the chosen pricing methodology.”³³ The petitioners maintain that the tariffs filed by the rural LECs should establish pricing on the basis of the TELRIC pricing methodology. In

³² The brief litany set forth by the CMRS Petitioners against one specific tariff and rural LEC tariffs in general is revealing. Every substantive issue raised by the Petitioners with respect to the tariffs could be addressed through established administrative process or in the course of an individual CMRS request for interconnection, the associated negotiation and, if necessary, arbitration process.

³³CMRS Petition. p. 6.

offering this legal analysis, the Petitioners again overlook the facts and the applicable law.

The rural LECs have not established the subject tariffs in order to govern terms and conditions for interconnection with a CMRS provider when the CMRS provider requests interconnection and negotiates terms and conditions. The CMRS Petitioners consistently ignore the fact that the tariffs exist to address the circumstances when the CMRS provider does not request interconnection, but instead achieves indirect connection utilizing a bilateral agreement with another carrier. The “TELRIC pricing methodology” is not applicable to these circumstances.

The statute is clear and the Commission’s application of the relevant statutory provisions to CMRS interconnection is equally clear. The ‘TELRIC pricing methodology is based on the pricing standard set forth in § 252(d)(2) of the Act. This section establishes a pricing standard that is applicable specifically and exclusively to § 251(b)(5) of the Act. The CMRS Petitioners maintain throughout their petition that they are addressing indirect interconnection which is required pursuant to § 251(a)(1) of the Act. The TELRIC pricing methodology is inapplicable. In fact, the most common form of indirect interconnection to rural LEC networks is the transport of telecommunications to and from the rural LEC network to another carrier’s network over the facilities of a third party carrier (most often a BOC or an interstate IXC) that obtains originating and terminating access service from the rural LEC, consistent with § 251(g) of the Act, in order to provide the indirect interconnection. As the Commission is well aware, the pricing of rural LEC access is not based on TELRIC; nor is any form of indirect interconnection required to be TELRIC based.

The analysis of the CMRS Petitioners suggesting that there **is** a lawful requirement that rural LECs price indirect interconnection on the basis of TELRIC is incorrect. The Alliance

notes that even if such a requirement did exist, the outcome of this proceeding would not be altered. Appropriate remedies exist, as discussed above, to address any aspect of a specific rural LEC tariff. The general nullification of all rural LEC tariffs that address indirect interconnection would be unnecessary to address a specific tariff issue. In any event, the analysis of the CMRS Petitioners incorrectly applies TELRIC to § 251(a) indirect interconnection. The analysis should be rejected as should the CMRS Petition.

4. The reliance by the CMRS Petitioners on §331(c)(1)(B) of the Communications Act is misplaced and reflects the confusion Petitioners have created with respect to the distinction between requested interconnection and indirect interconnection.

The CMRS Petitioners also provide an extensive, but flawed, analysis of the basis for the Commission's jurisdiction over the subject matter of their request. While the Alliance does not question the Commission's jurisdiction over CMRS interconnection, the Alliance does respectfully request that the Commission recognize the issue raised as a result of the incorrect analysis offered by the Petitioners. The analysis reveals the very basis of the confusion that the Petitioners have attempted to create.

The CMRS Petitioners inaccurately pronounce that "Congress has imposed a statutory mandate for the Commission to address CMRS interconnection issues of the sort contained in this petition."³⁴ (Emphasis added). In support of their contention, the CMRS Petitioners quote the first sentence of §332(c)(1)(B) of the Act and conclude that the "statute 'requires' it to act on petitions such as this that are filed under this statute."³⁵

It is significant, however, to look at both sentences of § 332(c)(1)(B). The first sentence

³⁴ CMRS Petition, p. 11.

³⁵ *Id.* Footnote omitted.

states:

Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. (Emphasis added).

The Alliance respectfully draws the Commission's attention to the underscored portion of the quoted section of the Act which has apparently been overlooked by the CMRS Petitioners. The underscored portion states "Upon reasonable request." In the circumstances addressed by the CMRS Petitioners, the CMRS carrier has provided no reauest (reasonable or otherwise) to the rural LEC. Instead, under the circumstances set forth by the CMRS Petitioners, the CMRS provider has arranged for indirect connection to the rural LEC in the absence of a reauest. The matter brought before the Commission by the CMRS Petitioners may be subject to the Commission's jurisdiction, but it is not subject to §332(c)(1)(B) of the Act! The "interconnection issues of the sort contained in this petition" are not subject to §332(c)(1)(B) because the issues are not related to a reauest made by the CMRS provider to the rural LEC.

The legal analysis and resulting conclusion reached by the CMRS Petitioners is incorrect and reflect the disregard for the second sentence of §332(c)(1)(B) which states:

Except to the extent that the Commission is required to respond to such a reauest, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

The statute is clear and unambiguous. § 332(c)(1)(B) applies only where there is an interconnection request. The facts and circumstances raised by the CMRS Petitioners address situations where the CMRS provider has not made an interconnection request to the rural LEC. This is hardly a distinction without a difference.

The errant analysis set forth by the CMRS Petitioners is reflective of a flaw that pervades the entire fabric of their argument. The CMRS Petitioners seek to assert rights as if they have

issued a request for interconnection, but they seek the Commission's approval to avoid the concomitant obligations. The CMRS Petitioners have not, however, issued interconnection requests to the rural LECs under the facts presented by their petition. Instead, they have negotiated indirect interconnection through a transit carrier (usually a BOC), and both the CMRS carrier and the transit carrier deny responsibility to pay the rural LEC for interconnection. In response, rural LECs have established tariffs to address these circumstances. The CMRS Petitioners wrongfully, and contrary to the plain words of the statute, seek to utilize § 332(c)(1)(B) of the Act as a basis for the Commission to grant their requested relief. The facts set forth by the Petitioners involve no request for interconnection and, accordingly, § 332(c)(1)(B) is inapplicable. The Alliance respectfully submits that the Commission should expeditiously deny the CMRS Petition.

CONCLUSION

The CMRS Petitioners have attempted to create a portrait that suggests that rural LECs have filed certain tariffs to impose interconnection terms and conditions on CMRS providers and consequently to deny CMRS providers their negotiating rights. The portrait is based on a flawed portrayal of the facts and applicable law and regulation. The illusion that the CMRS Petition attempts to create is based on smoke and mirrors.

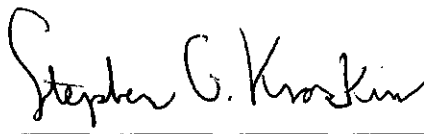
The CMRS Petitioners hold up a mirror with a glaring reflection of their rights under §§ 251, 252, and 332(c)(1)(B) to request and negotiate interconnection based on statutory pricing standards. In the smoke, however, the CMRS Petitioners seek to utilize indirect interconnection to connect to rural LECs without making a request for interconnection. In the combined smoke and mirrors, the CMRS Petitioners (and other CMRS carriers) have contracted with carriers (most often a BOC according to the CMRS Petition) to transit traffic between the CMRS carrier and the rural LEC. In the haze of the resulting smoke and mirrors, both the CMRS carrier and the transit carrier deny responsibility for payment for the interconnection services provided by rural LECs.

The CMRS Petitioners have wrongfully asked the Commission to nullify the rural LEC tariffs and, thereby, to condone the existing circumstances whereby the CMRS providers and transit carriers enter into bilateral agreements, establish indirect interconnection to rural LEC networks, and deny responsibility for payment to the rural LEC for interconnection. US LEC presents a similar set of circumstances whereby an IXC has attempted to escape responsibility for the utilization of access services. The Alliance respectfully submits that the Commission should not condone the actions of any carrier that seeks to avoid its responsibility for payment of interconnection and access services. The Alliance further submits that the Commission should

investigate the conduct and practices of carriers that have engaged in bilateral agreements to achieve indirect interconnection to rural LEC networks and deny responsibility for payment for the interconnection services they receive from the rural LECs. Finally, the Alliance urges the Commission to deny the CMRS Petition and to grant the US LEC Petition on an expeditious basis

Respectfully submitted,

ALLIANCE OF INCUMBENT RURAL
INDEPENDENT TELEPHONE COMPANIES

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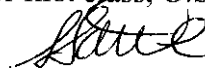
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October 18, 2002

CERTIFICATE OF SERVICE

I, Saratu Samande, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of the Alliance of Incumbent Rural Independent Telephone Companies and the Independent Alliance" was served on this 18th day of October 2002, via hand delivery or first class, U.S. Mail, postage prepaid to the following parties:



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